Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,

Nos. 81-2466 and 82-22

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF POLSON, MONTANA, PETITIONER

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL.

JAMES M. NAMEN, ET AL. AND STATE OF MONTANA, PETITIONERS

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL. AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Flathead Indian Reservation was disestablished by the Act of Apr. 23, 1904, ch. 1495, 33 Stat. 302.

2. Whether the Tribes are the beneficial owners of the bed of the south half of Flathead Lake within their Reservation.

3. Whether the Tribes are the beneficial owners of the banks of the south half of Flathead Lake, between high and low water mark.

4. Whether the Tribes have the authority to regulate the exercise of the riparian rights of access and wharfage by non-Indian owners of land along the south half of Flathead Lake.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2406

CITY OF POLSON, MONTANA, PETITIONER

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL.

No. 82-22

JAMES M. NAMEN, ET AL. AND STATE OF MONTANA PETITIONERS

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL. AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-33)[1] is reported at 665 F.2d 951. The opinion of the district court (Pet. App. 35-155) is unreported. Earlier opinions of the court of appeals (Pet. App. 202-205) and district court (Pet. App. 167-201) in this case are reported at 534 F.2d 1376 and 380 F. Supp. 452, respectively. A petition for certiorari seeking review of the earlier judgment of the court of appeals was denied at 429 U.S. 929 (1976).

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1982. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 10, 1982 (Pet. App. 34). By order dated May 25, 1982, Justice Rehnquist granted an extension of time to July 1, 1982, for the filing of the petitions for certiorari. Both the petition in No. 81-2406 and the petition in No. 82-22 were filed on July 1, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND TREATIES INVOLVED

The federal statutes and treaties involved are set forth in the appendix to the petition in No. 82-22 (Pet. App. 206-216, 217-225, 236-243). The Tribe's Shoreline Protection Ordinance, Ordinance 64A, is set forth at Pet. App. 272-285.

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[1] No appendix was filed with the petition in No. 81-2406. See Pet. 1. Accordingly, all "Pet. App." references herein refer to the appendix to the petition for certiorari in No. 82-22.

STATEMENT

This case arises out of the efforts of the Confederated Salish and Kootenai Tribes to exercise governmental authority to protect the shoreline of Flathead Lake within their Reservation. In its present posture, the case specifically involves the question whether the Tribes have the power to enforce their Shoreline Protection Ordinance [2] against non-Indian owners of fee lands riparian to Flathead Lake.

1. The Tribes are a confederation of American Indian Tribes organized under the Indian Reorganization Act of 1934, ch. 216, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, with a governing body recognized by the Secretary of the Interior. They occupy the Flathead Indian Reservation, created pursuant to the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (Pet. App. 206-216).

Flathead Lake is a navigable body of water approximately 26 miles long and up to 5 miles wide (Pet. App. 6). The Treaty of Hell Gate defines the northern boundary of the Reservation to bisect Flathead Lake (*id.* at 208), placing its south half within the Flathead Reservation. Most of the lands riparian to the lake's south half are now owned by non-Indians (*id.* at 110). As of October 1973, there were 1,407 non-tribal docks and/or breakwaters along that portion of the lake (*id.* at 123).

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[2] Adopted in 1977 with the approval of the Secretary of the Interior, the ordinance (Pet. App. 272-285) regulates shoreline activities—specifically, landfills and dredging, and the building of new, and maintenance of existing wharves, docks, etc.—below the high water mark.

Because the district court held that the Tribes lacked the power to accomplish such regulation (*id.* at 88-111, 153), and because the court of appeals has recalled its mandate reversing that determination (see page 8, *infra*), the tribal ordinance has yet to become effective.

2. This litigation began in August 1973, with an action brought by the Tribes against the Namens, successors in interest to an Indian allottee who had obtained a patent in fee to a lakeside property from the United States, pursuant to the Act of Apr. 23, 1904, ch. 1495, 33 Stat. 302 (Flathead Allotment Act) (Pet. App. 6-7). In connection with a marina business, the Namens and their predecessors had built piers, wharves, and other structures which extended into Flathead Lake well beyond the high water mark (*id.* at 7). The Tribes sought a declaratory judgment that these structures were in trespass upon tribal property, and injunctive relief requiring the removal of the structures and restoration of the lake bed below the high water mark (*ibid*). The City of Polson, Montana, also a riparian landowner, intervened as a defendant.

The Namens and the City of Polson asserted in defense that (1) the federal patents conveyed title to the low water mark under allegedly controlling state law; (2) if they lacked title to the low-water mark, they nevertheless had riparian rights of access and wharfage under federal common law; and (3) the structures in question were a proper exercise of their riparian rights. In August 1974, the district granted partial summary judgment for defendants, holding that they did possess the riparian right of wharfage and access to navigable waters, but reserved judgment as to whether existing structures abused those rights (Pet. App. 199-201). However, the court rejected defendants' argument that they held any title below the high-water mark, concluding (*id.* at 179) that the United States retained title to the bed and banks of Flathead Lake as trustee for the Tribes. *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont. 1974) (*"Namen I"*). On appeal

by the Tribes under 28 U.S.C. 1292(a)(1), the court of appeals affirmed (Pet. App. 202-205), adopting the opinion of the district court as its own. 534 F.2d 1376 (1976). The Tribes' petition for certiorari was denied. 429 U.S. 929 (1976).

3. In November 1975, the City of Polson sued the Tribes, seeking a declaratory judgment that the reservation had been disestablished and diminished, at least to the extent of its allotment and alienation in fee to non-Indians following enactment of the Flathead Allotment Act (Pet. App. 8). The State of Montana intervened as a plaintiff in the City's action, which was consolidated with that brought by the Tribes (*ibid.*).

In July 1977, the Tribes enacted their Shoreline Protection Ordinance, which was approved by the Secretary of the Interior.[3] In September 1977, the Tribes amended their complaint in *Namen I* to allege further that the structures below high water mark violated Ordinance 64A, interfered with navigation and the Tribes' fishing rights, and degraded the water quality of the lake. The United States intervened as plaintiff in the Tribes' suit (Pet. App. 8).

In December 1977, the United States filed a separate complaint praying for a declaration that (1) the Flathead Reservation had not been disestablished or diminished to any extent by the Flathead Allotment Act of 1904; and (2) the Tribes have authority to regulate the use of the bed and banks of Flathead Lake within the Reservation. The case was consolidated with those of the Tribes and City of Polson (Pet. App. 8).

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[3] The Tribe's constitution requires that "any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior." Art. VI, Sec. 1(n). See Pet. App. 106.

The consolidated cases were submitted for decision on documentary evidence, affidavits, and the briefs of the parties, without live testimony. The district court adhered to its conclusions in *Namen I*, including its holding that the United States holds the bed and banks of the south half of Flathead Lake below high water mark in trust for the Tribes (Pet. App. 44-45, 52, 153-154). In addition, the court held, favorably to the Tribes and United States, that "there has been no disestablishment or diminishment of the Flathead Indian Reservation" (*id.* at 54, 82-83, 153). Nevertheless, the court concluded, the end result of various allotment acts—transfer of land to non-Indian ownership—"implicitly divested the Tribes of the power to impose tribal land use regulations upon both the land transferred to non-Indian ownership and the federal common law rights of access and wharfage that were 'annexed' to that land" (*id.* at 98-99).

On uncontradicted evidence, the court found further that the piers, wharves, and other structures were reasonable exercises of the riparian rights of access and wharfage and did not impermissibly interfere with navigation or Indian fishing rights (*id.* at 149-150). The court dismissed the counts in the complaints directed against such structures, subject to the power of the United States to regulate them under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, and Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.* (Pet. App. 154.)

4. All parties appealed. On the issue of the Reservation's termination by opening it to non-Indian settlement, the court of appeals applied the settled principles enunciated by this Court (Pet. App. 9-10) and found—in the language of the relevant legislative acts (*id.* at 10-13), the surrounding circumstances and legislative history (*id.* at 14-19), and in the sub-

sequent legislative, executive, and judicial treatment of the Reservation, both state and federal (*id.* at 18-22)—no clear indication of congressional intent to terminate or reduce it from its original boundaries (*id.* at 10, 22). The court of appeals therefore affirmed (*id.* at 9, 22) the judgment of the district court that the Flathead Reservation had not been disestablished or diminished.

The court of appeals also approved the ruling that the United States holds title to the bed and banks of Flathead Lake within the Reservation in trust for the Tribes (Pet. App. 28). The court of appeals noted (*id.* at 23) that it had settled the question some forty years ago in *Montana Power Co.* v. *Rochester*, 127 F.2d 189, 191 (9th Cir. 1942), and that its holding is "strongly supported by *stare decisis*" (Pet. App. 23), especially in light of the fact that the development and production of hydroelectric power on the Flathead Reservation has proceeded on the premise that the Tribes own the beneficial interest in the south half of Flathead Lake (*id.* at 23-24 and n.26). The court of appeals held that this Court's recent decision in *Montana* v. *United States*, 450 U.S. 544 (1981), did not require a different result here, because (1) the Treaty of Hell Gate expressly divided the lake in two, placing the south half within the Reservation (Pet. App. 26), and (2) there existed a "public exigency" supporting federal retention of the bed and banks in order to bring several Tribes—one dependent on fishing—together on a single Reservation sufficient to their needs (*id.* at 27-28).

Finally, the court of appeals held "that the Tribes have the authority to apply Ordinance 64A to regulate the riparian rights of non-Indians owning land within the Flathead Reservation" (*id.* at 33), and reversed the district court's judgment that the Tribes have

been "implicitly divested" of any such regulatory power over non-Indians (*id.* at 98-99). Because the Tribe's Shoreline Protection Ordinance "seek[s] to regulate non-Indians' use of tribal trust land" (*id.* at 32)—*i.e.*, the bed and banks of Flathead Lake within the Reservation—the court of appeals rejected the implicit divestiture rubric applied by the district court prior to this Court's decisions in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980), and *Montana* v. *United States*, *supra*, 450 U.S. at 557, 563-567.

By order of June 21, 1982, the court of appeals recalled its mandate "pending filing of a petition for certiorari on or before July 1, 1982." Implementation of the tribal ordinance is therefore effectively stayed pending action by this Court on these petitions. See page 3, note 2, *supra*.

ARGUMENT

The ruling of the court of appeals is correct and does not conflict with the decision of any other Circuit, or with any precedent of this Court. The issues resolved, moreover, turn on the special history of a single Indian Reservation and present no question of general importance requiring this Court's intervention. Under traditional standards, therefore, certiorari should be denied.

But, in this instance, there are additional reasons for the Court to withhold its writ. All but one of the questions now tendered have been settled by final judgments previously entered, in some cases by both State and federal courts several decades ago, reaffirmed several times since. Even if, because different parties have taken up the challenge, the doctrines of res judicata and estoppel do not erect an absolute bar to relitigation, we submit this Court properly may de-

cline to reconsider what ought, by now, to be viewed as settled rules of property law, more than sufficiently tested and re-examined by a large number of judges, always with the same result.

And, finally, petitioners have a questionable stake in the remaining issue—the authority of the Tribes to regulate structures jutting into Flathead Lake. Indeed, each of the petitioners is effectively assured of a "grandfather" exemption from the charges and potential restrictions which the tribal ordinance otherwise authorizes. It may be doubted whether the Court need intercede to answer what is, for petitioners, largely an academic question, except only for injured pride.

1. We notice first the "termination", "disestablishment" or "diminishment" issue, rehearsed at length in the petition filed by the City of Polson (No. 81-2406).[4] So far as the status of the Flathead Reservation was ever in doubt, the question has been thought quieted, at least since 1942, when the court of appeals decided *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942), Pet. App. 156, which described the alienated fee lands bordering Flathead Lake as remaining within the Reservation. *Id.* at 158, 161-166. The specific point was confirmed by the

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[4] We are not entirely clear about the City's contention. Apparently, the argument is that the Flathead Reservation was wholly terminated or disestablished in 1904, but "recreated," in part, by "restoration" of unalienated lands under the Indian Reorganization Act after 1934. See 81-2406 Pet. 5-7, 20-22. Other objections aside, however, that theory is inconsistent with this Court's observations in *Clairmont* v. *United States*, 225 U.S. 551, 553 (1912), and *Pronovost* v. *United States*, 232 U.S. 487, 489 (1914), expressly recognizing the continuing existence of the Flathead Reservation, whatever its boundaries, as of 1911.

Montana Supreme Court in 1951, *State ex rel. Irvine* v. *District Court*, 125 Mont. 398, 239 P.2d 272, and, again, in 1973, *Security State Bank* v. *Pierre*, 162 Mont. 298, 511 P.2d 325. See, also, *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954); *State ex rel. McDonald* v. *District Court*, 159 Mont. 156, 496 P.2d 78 (1972) (in which State criminal jurisdiction was premised on a cession under Public Law 280, not disestablishment of the Reservation), and *McCrea* v. *Busch*, 164 Mont. 442, 524 P.2d 781 (1974). The undiminished status of the Flathead Reservation has been the premise of several decisions by the United States District Court for the District of Montana, *e.g.*, *United States* v. *Pollmann*, 364 F. Supp. 995, 998-999 (1973); *Confederated Salish and Kootenai Tribes, Montana* v. *Moe*, 392 F. Supp. 1297, 1312-1313, 1316-1317 (1975), aff'd, 425 U.S. 463 (1976), and, indeed, has apparently been accepted by this Court in *Moe*. See 425 U.S. at 466-467, 478-479. In *Namen I*, involving all the present petitioners except the State of Montana, it was expressly held by the district court in 1974 (Pet. App. 167, 178), in an opinion adopted as its own by the court of appeals (*id.* at 202, 205), that the Flathead Reservation retains its original boundaries, including the riparian lands here at issue. With singular indulgence, the courts below nevertheless re-examined the issue afresh, and, after full consideration, re-affirmed the earlier rulings. *Id.* at 35, 44-45, 52-83 (D. Mont.); *id.* at 2, 9-22 (9th Cir.).

In these circumstances, it is extraordinary to ask this Court to intervene. More than forty years of litigation, during which every judge has reached the same conclusion, should be deemed more than enough judicial process on an issue of purely local importance.

To be sure, it is suggested that intervening decisions by this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)), have changed the ground rules. But the Court has not purported to announce any new principle. On the contrary, *Mattz* v. *Arnett*, 412 U.S. 481 (1973), has been re-affirmed (see 420 U.S. at 449; 430 U.S. at 585, 586-587, 588 n.4, 592, 615), and the only question here is whether the legislation "opening up" the Flathead Reservation should be construed—unlike the similar provision considered in *Mattz*—as revealing the same congressional intent to disestablish, or diminish, the Reservation, as was found to be the case for the Lake Traverse and Rosebud Sioux Reservations. That issue was fully addressed in the decisions below and the differences are sufficiently articulated in those opinions. See Pet. App. 52-83, 9-22. We submit there is no occasion for this Court to re-examine the matter once again.

2. The same comments are appropriate in respect of the issue of title to the bed of the south half of Flathead Lake. That question, also, has been repeatedly litigated and consistently resolved in favor of the Tribes. The point was decided after full consideration in the *Montana Power Co.* case, *supra*, in 1942 (Pet. App. 161-166), and was the predicate for a series of decisions by the Court of Claims (*e.g.*, *Confederated Salish and Kootenai Tribes* v. *United States*, 173 Ct. Cls. 398, 399-403 (1965); *id.*, 437 F.2d 458, 473 (1971)) and by the District of Columbia Circuit (*e.g.*, *Montana Power Co.* v. *Federal Power Commission*, 445 F.2d 739, 742 n.1, 751 (1970), cert. denied, 400 U.S. 1013 (1971); *id.*, 459 F.2d 863, 865, 871-872, cert. denied, 408 U.S. 930 (1972)). The tribal interest in the lake bed was expressly re-affirmed in

Pollmann, *supra* (364 F. Supp. at 999), in *Namen I* (Pet. App. 177, 178-179), and, once again, by both courts below (*id.* at 45-52, 23-28).

Here, also, the pretext invoked for relitigating a point so firmly established by previous judgments is a recent decision of this Court, in this instance *Montana* v. *United States*, 450 U.S. 544 (1981). But, once again, the Court was not purporting to announce new principles. The prevailing opinion in *Montana* merely applies the rule of *United States* v. *Holt Bank*, 270 U.S. 49 (1926), to the particular history of the Crow Reservation and the Big Horn River. See 450 U.S. at 552-557. As the court below explained (Pet. App. 25-28), the present case is obviously distinguishable. Here, unlike the situation in *Montana*, the relevant treaty expressly mentioned and included the water body in dispute and the heavy dependence of at least one of the affected Tribes on fishing fully justified inclusion of a portion of Flathead Lake within the Reservation.

In sum, there has been no departure from the controlling principles and the decision below can safely be left undisturbed. This Court has sufficient burdens without undertaking re-examination of long settled local property disputes that have been resolved with full respect for all binding precedents.

3. The issue relating to ownership of the banks of Flathead Lake within the Reservation—the area between high and low water mark—is equally a matter settled forty years ago, and since re-affirmed. The point was fully considered and resolved in *Montana Power* (Pet. App. 162-166), and has been re-affirmed in *Pollmann*, *supra*, 364 F. Supp. at 999, in *Namen I* (Pet. App. 179 and n.7), and, again, by both courts below in the present case. *Id.* at 50-52, 23.

In this instance, petitioners rely on *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), as requiring a re-assessment of the prior rulings confirming tribal ownership of the Lake banks. Assuming the United States holds the bed proper, it is suggested that the shoreward boundary of that ownership, although governed by federal law, ought to be resolved by borrowing the State law rule. But *Wilson* suggests no such result. That decision dealt with lands at the edge of an Indian Reservation and the effect of geographical changes in the course of the boundary river, not an area still within the Reservation which nature has not altered.

It goes without saying that if the Treaty of Hell Gate confirmed to the Tribes the bed of the south half of Flathead Lake, as well as the uplands to the south, it did not exclude the intervening banks. And it is equally absurd to suggest that, in 1889 when Montana was admitted to the Union, the United States retained the bed but released the banks to the new State. Just as, under the Equal Footing Doctrine, the State takes both bed and banks to high water mark (see *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 375, 376 (1977)), so both bed and banks must be deemed included when the United States withholds the usual grant to the State by a previous reservation in favor of Indian Tribes. See *Montana* v. *United States*, *supra*, 450 U.S. at 569 n.1 (Blackmun, J., dissenting).

Finally, it is clear that, after entering the Union, Montana could not unilaterally alter that situation by enacting general or special laws in favor of riparian owners, granting to them a portion of the lands retained by the United States for the benefit of the Tribes. Recognizing the obstacle, petitioners therefore assert that the United States itself accomplished this

result when it granted patents to lakefront lots. But there is no basis for so concluding.

Whether the federal patents conveying riparian parcels stopped at the high water mark is a pure question of federal law. See *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 376-377; *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935). And, in the absence of any contrary indication in the instrument, the presumption is that such patents grant no more in the case of navigable waterways—if only to avoid encroachment on what is usually the State's title to the bed and banks of the water body. See Pet. App. 166. There is no justification for fashioning a different rule when including the banks would encroach on the like interest of Indian Tribes—especially where, as here, the bed and banks were reserved to the Indians because of their special need for the fishery.

What is more, importing State law would create intolerable confusion. Any allotments made under the General Allotment of 1887, before Montana became a State in 1889 or before it adopted its present "low water" rule in 1895 (see Pet. 14 n.20), would presumably exclude the banks.[8] So, also, we suppose, "surplus" lots along the Lake that were never alienated would reach only to high water mark. On the other hand, later issued patents would include the banks. Thus, neighboring parcels would enjoy differing riparian rights in a checkerboard pattern that

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[8] Indeed, before 1895, there was no arguable basis for construing federal grants of riparian lands in Montana as including the banks of a navigable waterway. And, of course, later enacted State law could not add to the grant at the expense of retained federal lands. It may be, in this instance, that all allotments occurred after 1895. But the result ought not turn on the date of actual allotment or the date when the State first adopted a low water rule.

only a title search could sort out. That is obviously a result to be avoided, if possible. It would create a scheme much more complex than the relatively straightforward distinction between a single regime governing all riparian acreage within the Reservation and another for the North half of Flathead Lake. In sum, this is an instance where federal policy to preserve tribal property undiminished combines with practical considerations to reject borrowing State law property rules within the boundaries of the Indian Reservation. Cf. *California, ex rel. Lands Commission* v. *United States*, No. 89, Orig. (June 18, 1982), slip op. 5-11.

4. We finally reach the only arguably open question, the so-called "regulatory issue." Presumably, petitioners have sought to relitigate the long-settled holdings concerning the status of the Reservation and the ownership of the bed and banks of Flathead Lake because of their bearing on the real point of controversy: whether, and to what extent, the Tribes may regulate the exercise of "riparian rights" by non-Indian owners of lakefront lots. Indeed, if we accept what has long been decided, there is little substance to petitioners' claim to total exemption from tribal regulation.

For our part, we begin with *Namen I*, in which both courts below held that, although the bed and banks of the Lake continue to be held by the United States in trust for the Tribes and the Flathead Reservation retains its original boundaries, nevertheless, fee owners of littoral lots enjoy a federal law right of access to the Lake, including the right to "wharf out" to navigable water. See Pet. App. 187-201, 203-205. That ruling was debatable, since no comparable federal patent, even though issued before statehood, would be construed as granting such an indefeasable right if

the State, upon acquiring the bed and banks of the navigable water body, chose to curb it or annul it. See *Shively* v. *Bowlby*, 152 U.S. 1, 36-47, 48-56, 57-58 (1894). Also see *United States* v. *River Rouge Co.*, 269 U.S. 411, 418-419 (1926).[6] No doubt, the courts below were influenced by the legitimate expectations of the purchasers, encouraged by Congress at the outset and acquiesced in by the Tribes and the United States for half a century thereafter, that they would enjoy such riparian rights. See Pet. App. 183-187, 200, 204-205. But, whatever the correctness of that ruling, we no longer challenge it.[7]

What is more, in the present case the district court reviewed the particular structures in suit that extend below high water mark—those belonging to the present petitioners—and concluded that none of them constitutes an abuse of the owner's riparian rights. Pet. App. 125-150. That determination was not actively contested on appeal (see Pet. App. 9 n.2) and was not disturbed by the court of appeals. Since neither the United States nor the Tribes have cross-petitioned, the ruling is presumably final. Accord-

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[6] Indeed, the petitioners asserted in the district court that their riparian rights were subject to state and local regulation (Pet. App. 89 n.60). And they have never objected to the district court's holding that such riparian activities are subject to the federal regulatory jurisdiction exercised by the Corps of Engineers. See Pet. 4 n.2.

Petitioners do not, therefore, contend that their rights of access and wharfage are absolute, but only that one government entity—the Tribe—lacks all authority to regulate their exercise.

[7] In 1976, the Tribes sought review here of that holding, and the United States supported their petition for certiorari. See Memorandum for the United States as Amicus Curiae in No. 76-185. But the Court denied certiorari. 429 U.S. 929 (1976).

ingly, so far as the present parties are concerned, their "vested rights" are protected and the issue of the Tribes regulatory authority has little, if any, practical effect.[8] This alone is a sufficient basis for this Court to decline to intervene.

At all events, however, there is no ground for faulting the ruling of the court of appeals vindicating a limited authority in the Tribes to regulate the exercise of riparian rights in the southerly part of Flathead Lake. We are dealing with activities occurring *on tribal trust lands*—the bed and banks of the Lake—*within an Indian reservation*, which effectively appropriate tribal property and potentially affect a lake and its fishery purposely embraced within Reservation boundaries. In these circumstances, it is very difficult to appreciate why the Tribes, with the express concurrence of the Secretary of the Interior, ought not be entitled to assert a modest jurisdiction.

It is unnecessary, at this date, to establish that the residual sovereignty of Indian Tribes is *not* limited to self-regulation of "internal" tribal affairs, but embraces a territorial jurisdiction over at least some activities of non-members within Reservation boundaries. That proposition, first authoritatively declared in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.)

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[8] The district court concluded (Pet. App. 150) that the specific structures at issue here

> are permissible, do not unreasonably interfere with tribal navigation, fishing, or boating, and do not result in degrading the waters of Flathead Lake.

That ultimate finding would seem to place them within the class of "existing" structures for which permits "shall" be issued under Section 5 of Ordinance 64A, without application fee or annual charge of any sort. See Pet. App. at 278-280.

515, 557 (1832), and re-affirmed at the turn of the Century in *Morris* v. *Hitchcock*, 194 U.S. 384, 392-393 (1904), was confirmed in modern times by *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), and has been consistently re-iterated. See, *e.g.*, *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 690-692 (1965); *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 426-427 (1971); *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170 and n.6, 174-175, 179 (1973); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65-66 (1978); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, No. 80-11 (Jan. 25, 1982), slip op. 7-18. To be sure, some limitations have been announced. *E.g.*, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana* v. *United States*, *supra*, 450 U.S. at 563-565. But the exceptions have not been allowed to swallow the rule. As the Court wrote in *Colville*, 447 U.S. at 152, and reaffirmed most recently in *Montana*, 450 U.S. at 565-566, and *Jicarilla*, slip op. 7-18, Indian Tribes retain "a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." See, also *Ramah Navajo School Board* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982), slip op. 4-5.

It may well be that, in due course, the Court will be required to mark out more precisely the scope of tribal regulatory authority within Reservations. But, we submit, the present case does not call for such re-

finements. The decision below more than generously accommodates the claims of the State, its municipalities and non-Indian citizens who acquired Reservation lands on Flathead Lake. The residual prerogative of the Tribes to impose reasonable charges and restrictions must be conceded, at least as to the placement of new structures along the lakeshore (see note 8, *supra*). To rule otherwise would substantially devalue the Tribes' beneficial ownership of the bed and banks of Lake Flathead, denigrate their interest in preserving the appurtenant tribal fishery, and deny the Tribes' governmental authority to regulate commercial and public activities within their territory for the common welfare. No new ground is broken here. The ruling of the court of appeals rests comfortably within bounds already well established and does not warrant further review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 388201 1085